

E5L9STRC

Decision

1           UNITED STATES DISTRICT COURT  
2           SOUTHERN DISTRICT OF NEW YORK  
-----x

3           ABIGAIL STRUBEL,

4                         Plaintiff,

5                         v.

13 CV 1106 (PAE)

6           TALBOTS CLASSICS NATIONAL BANK  
7           AND THE TALBOTS, INC.,

8                         Defendants.

9                         New York, N.Y.  
10                         May 21, 2014  
11                         10:44 a.m.

12           Before:

13                         HON. PAUL A. ENGELMAYER

14                         District Judge

15                         APPEARANCES

16           BRIAN L. BROMBERG  
17           HARLEY J. SCHNALL  
18           Attorneys for Plaintiff

19  
20           WINSTON & STRAWN  
21           Attorneys for Defendants  
22           BY: JONATHAN W. MILLER

23  
24  
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1 (In open court; case called)

2 MR. BROMBERG: Brian Bromberg, Bromberg Law Office,  
3 P.C. for the plaintiff on the class. Good morning, your Honor.

4 THE COURT: Good morning.

5 MR. SCHNALL: Harley Schnall, the Law Office of Harley  
6 Schnall also for the plaintiff in the class.

7 THE COURT: Good morning.

8 MR. MILLER: Jonathan Miller from Winston & Strawn on  
9 behalf of the defendants.

10 THE COURT: Good morning to you.

11 I notice for some reason the courtroom has largely  
12 cleared out. I can't imagine why.

13 We're here for a fairness hearing regarding the  
14 proposed class action settlement. Your papers, really I'm  
15 directing myself to plaintiff, were very helpful to me. I do,  
16 however, have a number of questions for you. Why don't we do  
17 this. Let me begin by asking the plaintiffs just briefly to  
18 explain big picture why this settlement ought to be approved  
19 and then I'll ask you the questions I have.

20 MR. BROMBERG: Sure, your Honor.

21 First of all -- I'm just looking. We don't seem to  
22 have any objectors.

23 THE COURT: Let me make a record. We can cover that  
24 right now. Put on the record, please, the notice that was  
25 given to potential objectors.

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1                   MR. BROMBERG: Well, notice was sent out by postcard  
2 to 159,836 class members. 926 notices were returned without a  
3 forwarding address. The claims administrator KCC, which has  
4 been in the business a long time, went online and used various  
5 resources to find 631 people and remailed the notices to them.  
6 295 could not be located at all by KCC. We've had a total of  
7 39 opt-outs. We also had a website set up where the long form  
8 notice was available.

9                   THE COURT: What was the means by which notice of this  
10 hearing though was sent? Was it sent by regular mail?

11                  MR. BROMBERG: Yes. By postcard, by regular mail,  
12 exactly.

13                  And the people were directed to the website as well  
14 where they could find the long form notice. And in addition,  
15 there was an 800 number that was specified on the postcard.  
16 And a number of people called the 800 number, requested the  
17 long form notice. In fact, it was 85 people who requested the  
18 long form notice.

19                  THE COURT: Right.

20                  In other words, all of the people who received the  
21 notice were notified of the time and place of today's hearing?

22                  MR. BROMBERG: Yes.

23                  THE COURT: And the record reflects that there is  
24 nobody here, correct?

25                  MR. BROMBERG: Yes.

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1                   THE COURT: Did you receive any communications from  
2 anyone indicating an intention to be here?

3                   MR. BROMBERG: No, your Honor.

4                   THE COURT: Defense, did you?

5                   MR. MILLER: No, we did not, your Honor.

6                   THE COURT: Very good. Thank you. Now that we've  
7 taken -- gotten the notice issue out of the way tell me why the  
8 settlement should be approved.

9                   MR. BROMBERG: Your Honor, we have the Grinnell  
10 factors that have been adopted by the Second Circuit. And, in  
11 fact, I did a little research awhile back and every circuit has  
12 adopted them in one form or another based on the Grinnell case,  
13 which sets forth the nine factors that should be taken into  
14 account.

15                  First of all, it's big picture. We have a settlement  
16 of 595,000 going to the class, which is 59.5 percent of the  
17 maximum that's recoverable. So we've done quite well here.  
18 We've got three-fifths of the maximum which is certainly a nice  
19 result.

20                  I wish the maximum was higher. It was just raised  
21 from 500,000 to 1 million recently. For many, many years, I  
22 believe since the '70s, it was stagnant at 500,000. Frankly, I  
23 think they should have moved it to 2 million to account for  
24 inflation, but they only moved it to 1 million.

25                  Now, we have the nine factors. The first factor the

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1 complexity, expense and likely duration of the litigation.

2 THE COURT: Let me just as to a few -- your papers --  
3 my issues actually more go to the legal fee than the factors.  
4 But me just ask you a couple of questions about the factors.  
5 Just help me understand what the novel issue of TILA law was  
6 that was presented. I don't fully understand it.

7 MR. BROMBERG: The issues of Truth In Lending Act were  
8 set forth in paragraphs 36 through 39 of the complaint.  
9 Basically they were given improper Fair Credit Billing Act  
10 notices with the initial account opening disclosures. This  
11 is -- well, it's novel because it's -- no one's really  
12 litigated these issues until recently. The changes came about  
13 after the 2008 financial collapse. A number of amendments were  
14 put into the Truth In Lending Act to require further  
15 disclosures. All the model forms were rewritten first by, I  
16 believe it was the Federal Reserve Bank and then later by the  
17 Consumer Financial Protection Bureau. And many banks have not  
18 come into compliance. This case was basically to get -- to get  
19 Talbots into compliance, to get the various -- the various  
20 creditors to start complying with giving the proper notices,  
21 the proper Fair Credit Billing Act notices with the initial  
22 account opening.

23 So that's essentially what the case was about.  
24 There's been very few reported decisions on whether or not the  
25 failure to give these notices violates. I believe we're

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1 actually responsible for many decisions that are out there.

2 THE COURT: Do you know following the filing of this  
3 lawsuit, whether the lawsuit prompted or stimulated other  
4 financial institutions to modify their practices to avoid the  
5 problem pinpointed in your complaint.

6 MR. BROMBERG: Well it's hard to specifically say that  
7 this lawsuit brought about the change. We know -- we've been  
8 bringing a number of these lawsuits, and we do know that the  
9 banks are coming into compliance now. We know that the  
10 Citibank subsidiary Department Stores National Bank has come  
11 into compliance now.

12 THE COURT: Since the filing of your lawsuit?

13 MR. BROMBERG: Since the filing of this and a number  
14 of other lawsuits. We know that Comenity Bank, which used to  
15 be known as World Financial Network National Bank has brought  
16 its disclosures into compliance. In other words, everyone is  
17 now moving into compliance largely as a result of the efforts  
18 we've made on these cases.

19 THE COURT: Have you brought parallel lawsuits raising  
20 the same claim against other financial institutions?

21 MR. BROMBERG: Similar claims, yes.

22 THE COURT: How many parallel other lawsuits have you  
23 brought?

24 (Pause)

25 MR. BROMBERG: I'd say we've brought probably about --

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1 I'd have to say probably six or seven of these lawsuits. Some  
2 of them are against the same financial institution like, for  
3 instance, Comenity used to be World Financial Network National  
4 Bank --

5 THE COURT: Yeah.

6 MR. BROMBERG: -- has accounts with many, many  
7 different department stores. So, for instance, we brought  
8 three lawsuits against them because --

9 THE COURT: And each of them has a separate statutory  
10 max that applies to each. In other words, each of them has  
11 million dollar max because it's a different course of dealing  
12 in effect?

13 MR. BROMBERG: That's our argument. Their argument is  
14 that we should be limited to a total of 1 million for all three  
15 combined.

16 THE COURT: Is this the first of these cases to be  
17 resolved?

18 MR. BROMBERG: We've had a number of them resolved but  
19 nothing's gone to final approval yet, I believe.

20 THE COURT: So this case may set some form of a  
21 guidepost for some of the other cases?

22 MR. BROMBERG: Absolutely.

23 I don't think any of those cases have actually gone to  
24 final approval yet. We've gotten motions for preliminary  
25 approval pending on three of them right now.

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1           THE COURT: Okay.

2           MR. BROMBERG: We have attempted to settle two others.  
3 Both against the same institution.

4           Settlement discussions on one more -- that's right --  
5 settlement discussions on one more, but none of those have gone  
6 to -- there's been -- none of them have had preliminary  
7 approval yet. None of them have had final approval yet.

8           THE COURT: All right. Tell me a little bit about the  
9 nature of the informal discovery that occurred in this case  
10 before settlement talks got underway.

11          MR. BROMBERG: The primary informal discovery was  
12 finding out the maximum exposure, the maximum of one million.  
13 That wasn't a big issue.

14          THE COURT: That's statutory.

15          MR. BROMBERG: That wasn't a big issue because they  
16 basically admitted the maximum.

17          Most of it had to do with finding out how many class  
18 members there were.

19          THE COURT: What work did you do before the settlement  
20 talks got underway?

21          MR. BROMBERG: Mostly preparation of the complaint,  
22 research of the various issues, discussions with clients,  
23 research of the law.

24          THE COURT: Of the 117.8 hours that you did in the  
25 case, how much were done before settlement discussions got

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1 underway, approximately?

2 MR. BROMBERG: I'd have to go back over it.

3 THE COURT: Ballpark? More than half? Less than  
4 half?

5 MR. BROMBERG: I'd have to say probably about half.

6 THE COURT: So, ballpark, about 60 hours of work  
7 precedes the settlement. And about 60 hours is the process of  
8 getting the settlement in place.

9 MR. BROMBERG: Yes.

10 THE COURT: That includes the submission of the papers  
11 you've made to me in support of the settlement?

12 MR. BROMBERG: Yes.

13 And honestly I'm expecting to be inundated with calls  
14 on this case once the actual checks go out.

15 There are two ways these settlements tend to work.  
16 One way is with a claim form class where people who submit the  
17 claim form get a check based on the number of people who submit  
18 the claim form. There, I tend to get inundated with calls  
19 before the final approval hearing.

20 When you have a settlement like this where everyone is  
21 being sent a check regardless of whether they've sent in a  
22 claim form, I tend to get overwhelmed with calls after the  
23 settlement.

24 THE COURT: Meaning, "What's this check for?"

25 MR. SCHNALL: Exactly.

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1                 THE COURT: And, "If I cash it, am I giving up some  
2 right?"

3                 MR. BROMBERG: Exactly.

4                 THE COURT: How much time can you expect to spend  
5 postsettlement on the phone, based on your prior experience?

6                 MR. BROMBERG: There are going to be hundreds of  
7 calls. I've had -- I'm anticipating probably a hundred calls a  
8 day once those \$3.73 go out I'm expecting to be inundated with  
9 calls.

10                THE COURT: So in that sense the 117.8 hours  
11 understates the amount of time that will unavoidably be spent  
12 dealing with the sequelae of this case?

13                MR. BROMBERG: Yes.

14                THE COURT: I take it yours is substantially a TILA  
15 practice? Your practice is largely in the TILA space?

16                MR. BROMBERG: Consumer Protection Act in general.  
17 Fair Credit Reporting Act. Fair Debt Collection Practices Act.  
18 Truth In Lending Act. Equal Credit Opportunity Act.

19                THE COURT: One of the questions I had in thinking  
20 about the legal fee here is for every case that you bring that  
21 bears fruit like this one, how many of them do not bear fruit?

22                In other words, I'm trying to understand -- you know,  
23 you've chosen to measure the lawyers' fee essentially as  
24 against the recovery, but as against the lodestar you're  
25 basically asking for close to \$1,700 an hour. In other words,

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1 based on -- and I have seen other cases where it goes the other  
2 way and the lodestar is more favorable and that's the argument  
3 that's made.

4 One of the ways to look at this is to look outside the  
5 four corners of the individual lawsuit and to say in effect:  
6 You're in a risk-taking business. You file lawsuits. Some of  
7 them fail. Some succeed. And the relevant unit of measure  
8 ought to be not just the four corners of this suit but the  
9 overall consumer protection practice that you're in. This is a  
10 helpful question.

11 So the question for you is how -- for each case that  
12 you bring which hits a small jackpot like this one, do you  
13 bring cases that die on the vine.

14 MR. BROMBERG: I'd say it's 50/50. In fact, your  
15 Honor, one of the cases was in this courtroom that died on the  
16 vine. That was Litman v. Chase. That was one of the cases  
17 that died on the vine.

18 THE COURT: What was the case?

19 MR. BROMBERG: Litman v. Chase. It was a case where  
20 it had to do with the date of acceptance of payments.

21 THE COURT: I remember that.

22 MR. BROMBERG: And then it happened to overlap with  
23 hurricane Sandy. It got a little complicated.

24 THE COURT: Yes. Yes. I remember that.

25 MR. BROMBERG: Also Schwartz v. HSBC.

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1           THE COURT: I remember that well.

2           MR. BROMBERG: Which was --

3           THE COURT: I think it was dismissed except for one  
4 claim made by the individual plaintiff that appeared to be  
5 unique to her. I believe everything but one claim. And the  
6 one claim that was left was not class cert worthy.

7           MR. BROMBERG: Yes. I'm sorry. I was confusing the  
8 two cases.

9           I'd say probably 50/50, the cases that die on the vine  
10 versus the cases that we push through to class certification.

11           And frankly, we're two of the few attorneys who  
12 actually push these cases through to class certification.  
13 There are a number of attorneys primarily in the FDCPA world  
14 who will file cases as class actions and settle them  
15 individually, which is something that I don't believe is an  
16 appropriate practice.

17           THE COURT: Tell me a little bit more about the lead  
18 plaintiff's efforts.

19           MR. BROMBERG: Well the lead plaintiff has been very  
20 much involved. Every step of the way we've been communicating  
21 with her, primarily through Mr. Schnall has been communicating  
22 with her, to make sure that she's on board with the settlement,  
23 to make sure that she's aware of her obligations as a class  
24 representative, to make sure --

25           THE COURT: How did she come -- I'm obviously asking

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1 the question because of the \$5,000 award that is anticipated  
2 for her.

3 Did you bring the case to her attention or did she  
4 bring it to yours?

5 MR. BROMBERG: She brought it to ours, your Honor.

6 THE COURT: So she came to see you and said, in  
7 effect, I'm troubled by what I'm seeing here in the form of  
8 this disclosure.

9 MR. BROMBERG: Came to Mr. Schnall with the account  
10 opening disclosures and said is everything kosher here.

11 THE COURT: The memorandum states that about  
12 approximately 159,502 individuals are entitled to receive  
13 settlement checks.

14 Look, I understand some of them won't cash them but  
15 how come that figure is proximate and not precise?

16 MR. BROMBERG: It was just -- I think it was just  
17 leftover from earlier -- an earlier draft.

18 THE COURT: In fact, that's the number of checks  
19 you're going to cut?

20 MR. BROMBERG: Yes.

21 THE COURT: Tell me a little bit about the SIPRI  
22 recipient to the extent checks aren't cashed.

23 MR. BROMBERG: The SIPRI recipient. It's the National  
24 Consumer Law Center. It is -- full disclosure. I speak at  
25 their conferences frequently. It's the leading institution. I

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believe it started out as the -- I'm trying to remember the name of the organization that it started out as. Sergeant Shriver -- I'd have to go back and check. It was essentially founded by legal services organizations around the country to serve as an educational and research arm to assist them with their efforts on behalf of consumers. They publish treatises, I think it's up to about 20, 25 treatises, that everyone in the industry uses; the defense side uses, plaintiff side uses. They also sponsor an annual conference on consumer rights litigation. I'd say 50 percent of it is made up of legal services attorneys from around the country. They give scholarships frequently to the legal services attorneys.

They also give educational -- they also sponsor educational presentations to the public. They do a lot of training of lawyers on how to handle these matters.

THE COURT: In your experience -- the checks are \$3.70 -- what percentage of them are likely never to be cashed and therefore the money to wind up with the SIPRI recipient?

MR. BROMBERG: I'd have to say probably a third of the money will end up with the SIPRI recipient.

THE COURT: Is that because the dollar value is so small that people don't take the checks very seriously?

MR. BROMBERG: It's two things. First of all, it's the dollar amount; second when a check comes out of the blue people are less likely to cash it than say the claim form

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1 situation. When you send in a claim form, you actually know  
2 you're going to get the check, you want the check, you're  
3 anticipating -- and there you get a much higher percentage of  
4 people who cash the checks.

5 In the non-claim-form situation, like we have here,  
6 where everyone is being sent a relatively small check,  
7 sometimes people are afraid to cash them. I get a lot of calls  
8 saying is this some kind of scam because there have been a  
9 number of scams primarily I think in the Northern District of  
10 California. There have been people pretending that they're  
11 class settlements and using that as a way of getting private  
12 information, stealing people's identities.

13 THE COURT: Let me just ask you. The attorneys' fee  
14 amount you say was resolved only after the class payment was  
15 settled; is that correct?

16 MR. BROMBERG: Yes.

17 THE COURT: So, how does that happen. In other words,  
18 you agree on the 590 some odd thousand dollars that goes to the  
19 class.

20 MR. BROMBERG: Right. \$595,000.

21 THE COURT: Then how does it come to pass that  
22 \$200,000 is chosen, I take it, only after you and the defense  
23 have firmly agreed on the 595 do you then say we think 200,000  
24 is the right number? How does the 200 get arrived at? It's  
25 coming out of their pocket.

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1                   MR. BROMBERG: Essentially we said we can either go to  
2 Judge Engelmayer and have him decide the fees based on a  
3 contested petition or we can sit here and try to resolve the  
4 number. I don't recall exactly how we got to the 200,000. I  
5 think we may have demanded -- we may have demanded like 250,000  
6 then agreed on 200,000. I don't recall exactly how we got to  
7 that number.

8                   But the other option was saying, you know what, we  
9 could do a contested fee position, go to Judge Engelmayer, let  
10 him decide the fees rather than agreeing on an amount. But we  
11 want to --

12                  THE COURT: I'm just interested in the practice of it  
13 all. How common is it in cases like this that the class  
14 payment is sorted out with finality before there is a  
15 discussion that opens as to the legal fee?

16                  MR. BROMBERG: It's not common. I believe it is the  
17 preferable practice in fact.

18                  THE COURT: I have not seen it often and I tend to  
19 agree with you. I'm just curious.

20                  MR. BROMBERG: Well I was involved in the -- I was  
21 involved in the drafting of the National Consumer -- excuse me,  
22 it was the National Association of Consumer Advocates Class  
23 Action Guidelines. Actually now the third version has just  
24 been approved, but I was involved in the second revision.

25                  And one of the things we discussed there, and everyone

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1 was quite firm on, is that the best practice is not even to  
2 talk about fees until after we resolve what the class is  
3 getting.

4 THE COURT: So, suppose, having agreed on the  
5 \$595,000, you then raise the issue of fees and your adversary  
6 says look, I'm happy for you get some fee but let's be real  
7 here. The settlement got started right after the lawsuit was  
8 filed. I'll pay you your hourly rate that's going to wind up  
9 fifty, sixty thousand dollars or something like that. But  
10 that's all I'll agree to.

11 Had that happened, I take it what happens then is the  
12 595,000 in class settlement stays in place, but then you ask  
13 for whatever you would want, which is going to be north of  
14 200,000. Your adversary asks for what I'm assuming to be the  
15 1.0 lodestar. And I resolve it.

16 Would that have been the way it would have played out  
17 had you not reached an agreement on 200,000?

18 MR. BROMBERG: That would have been the way it played  
19 out. We would have made a similar motion. We probably would  
20 have submitted a number of affidavits. For instance, I  
21 probably would have gotten an affidavit -- I think I refer to  
22 Mr. Fishman in my papers. I probably would have gotten an  
23 affidavit from him as to what would be a reasonable rate for my  
24 work and for Mr. Schnall's work.

25 THE COURT: Thank you.

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1                   Let me ask defense counsel just briefly as to that  
2 last issue.

3                   I note that you don't oppose the \$200,000 as to fees.  
4 I would -- I'm trying to free you from that constraint and ask  
5 you for your objective view about the appropriateness of that  
6 fee.

7                   MR. MILLER: It was a negotiated number, your Honor.  
8 We could have gone the route that Mr. Bromberg suggested. You  
9 know, when you negotiate these things you consider how  
10 expensive it is to litigate that issue on an all-in cost. We  
11 went back and forth on a number that we would agree to the max  
12 of. We didn't have access to his billing records or times, but  
13 he had generally given us a sense of the amount of time that he  
14 had put in.

15                  I'm not going to back away from what we've agreed to.  
16 We agreed to the settlement agreement that we would support an  
17 application up to that amount.

18                  THE COURT: Is it correct that the class payment was  
19 discussed and completely resolved before attorneys' fees opened  
20 up as the subject of discussion.

21                  MR. MILLER: Yes, it is. I mean the old practice used  
22 to be to try to do it all at once and put it together.  
23 Mr. Bromberg does take a very hardline that he doesn't think  
24 that's the right way to approach it. We understood from the  
25 get-go that we would have no discussions about fees until we

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1 had resolved the case itself, and that's the way it proceeded.

2 THE COURT: Very good. I'm glad you did it that way.  
3 It seems to me that is the more appropriate approach. So I  
4 commend you for doing it.

5 Is there anything further you'd like to say?

6 MR. MILLER: Not a thing, your Honor.

7 THE COURT: All right.

8 (Pause)

9 THE COURT: To begin with, we're here for a fairness  
10 hearing regarding the proposed class action settlement in this  
11 case, Strubel v. Talbots Classics National Bank, 13 CV 1106. I  
12 have had a very helpful and constructive colloquy this morning  
13 with counsel, both Mr. Bromberg and Mr. Miller. And the  
14 inquiry I've had has helped me better understand the issues  
15 here. This bench opinion will be my decision as to the  
16 application to approve the settlement, and the legal fees, and  
17 the service award here. I don't intend to issue a separate  
18 written decision but just a bottomline order along the lines  
19 that counsel have given me. So to the extent that the analysis  
20 is relevant to any of you, you can find it in the transcript,  
21 if you wish to order the transcript of this proceeding.

22 To begin with, I'm going to summarize the procedural  
23 background of the case.

24 On February 19, 2013, plaintiff Abigail Strubel  
25 brought this class action against defendants Talbots Classics

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National Bank and the Talbots, Inc. (I'll collectively refer to them as Talbots). Strubel alleged that the credit card applications available in Talbots stores violated the Truth In Lending Act (TILA), 15 U.S.C. Section 1601 et seq., in several respects. She alleged that the applications failed to fully disclose the rights and obligations of consumer and lender with respect to certain technical aspects of billing disputes. She also alleged that these applications mischaracterized Talbots' authority to alter terms during a cardholder's first year. Strubel proposed to proceed with a claim on behalf of a class of similarly situated Talbots cardholders. To be clear, Talbots denied and denies the material allegations asserted in the complaint. Talbots denies liability. Talbots denies that the case, were it to have gone to the merits, was suitable for class treatment. Talbots has also represented by way of background that on September 28, 2012 it entered into a series of agreements with Comenity Bank and associated entities, which I'll call Comenity, in which Comenity acquired all of Talbots's retail credit card business.

Not too long after the complaint was filed, the parties began to discuss settlement. As settlement conversations continued, the parties requested, and the Court granted, a series of extensions and time to answer the complaint. The parties ultimately entered into a settlement agreement, the terms of which I will describe in a moment, and

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1 which were the subject of some colloquy today.

2                   On January 22, 2014, this Court certified the  
3 settlement class and preliminarily approved the proposed class  
4 action settlement. Before the Court today are plaintiff's  
5 motions for final approval of three things. One, the class  
6 action settlement; two, attorneys' fees and costs; and three, a  
7 service award for the lead plaintiff, Ms. Strubel. Defendants  
8 do not oppose any of these motions.

9                   The parties engaged a claims administrator to provide  
10 notice to the 159,836 class members. Thirty-nine class members  
11 opted out of the settlement. None filed objections. None came  
12 to court today to object or comment on the settlement.

13                  Now I'm going to briefly summarize the terms of the  
14 settlement agreement. The settlement class is defined as  
15 follows, specifically reading from the agreement. "The  
16 plaintiff settlement class consists of all persons who both  
17 opened a Talbots credit card account and first used said  
18 Talbots credit card account during the class period, excluding  
19 Strubel; any judge presiding over the action; or any person who  
20 served as an officer or director of Talbots or Comenity during  
21 the class period. The class period term is defined to mean the  
22 period between June 18, 2012 and up through and including  
23 February 25, 2013.

24                  The settlement agreement provides that the defendants  
25 shall pay a total of \$595,000 into a settlement fund. In

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1 addition to this class payment, the agreement authorizes an  
2 award of up to \$200,000 for attorneys' fees and costs and a  
3 separate service award of up to \$5,000 for the lead plaintiff,  
4 Ms. Strubel. The parties negotiated the class payment before  
5 they negotiated attorneys' fees or the service award. In  
6 total, therefore, under the agreement Talbots would pay  
7 \$800,000 to plaintiffs and their attorneys, including  
8 Ms. Strubel here, a service award. In addition to the class  
9 payment, the settlement agreement contemplates that Talbots  
10 will pay all notice and distribution costs. In exchange,  
11 importantly plaintiffs agree to release Talbots and Comenity  
12 from liability for any claims against them.

13 In a class action under TILA, statutory damages are  
14 limited to the lesser of \$1 million or one percent of a  
15 creditor's net worth. In this case Talbots has represented  
16 that one percent of its net worth exceeds the \$1 million cap.  
17 Accordingly, the class payment of \$595,000 amounts to  
18 59.5 percent, or close to 60 percent, of the maximum statutory  
19 damages award.

20 The class initially contained 160,463 class members.  
21 The claims administrator removed 627 duplicate names; the  
22 notices for 295 individuals were returned as undeliverable with  
23 no forwarding information; and 39 individuals opted out. Doing  
24 the math, this left some 159,502 class members who are entitled  
25 to receive settlement checks. These individuals will receive

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1 an equal share of the \$595,000 settlement fund, in other words,  
2 a check in each case for approximately \$3.73.

3 I'm now going to discuss the applicable legal  
4 standards.

5 As to the certification of the settlement class.

6 On January 22, 2014 I certified the settlement class.

7 I reaffirm that judgment today. Under Rule 23(a) one or more  
8 members of the class may sue as representative parties on  
9 behalf of all members of the class only if I find that the  
10 statutory prerequisites are met. These are: Numerosity,  
11 commonality, typicality, and adequacy. I find that all of  
12 these prerequisites are met. The class is numerous with more  
13 than 150,000 members; liability appears to present an identical  
14 issue for all plaintiffs; class counsel are clearly experienced  
15 in TILA matters.

16 Having now found that Rule 23(a) is satisfied, I must  
17 turn to Rule 23(b) and determine whether at least one of the  
18 three prongs of that rule is satisfied. Relevant here is the  
19 predominance and superiority prong, the third prong. It  
20 requires, "That questions of law or fact common to class  
21 members predominate over any questions affecting only  
22 individual members, and that a class action is superior to  
23 other available methods for fairly and efficiently adjudicating  
24 the controversy." This rule is designed as the Supreme Court  
25 has said "to achieve economies of time, effort and expense, and

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1 promote uniformity of decision as to persons similarly  
2 situated." I'm citing, of course, the Amchem decision, Amchem  
3 Products v. Windsor, 521 U.S. 591 at 615, (1997).

4 In this case liability appears to present identical  
5 issues of law and fact as to all plaintiffs. That is because  
6 all plaintiffs received apparently identical disclosures from  
7 Talbots and the issue is whether or not those disclosures  
8 satisfy or do not satisfy the standards of TILA. There has  
9 about no inherently individual question that has been brought  
10 to the Court's attention, nor does this appear to be a case  
11 where issues such as reliance that are inherently  
12 individualized are relevant. Accordingly, I find that the  
13 predominance requirement of Rule 23(b)(3) is satisfied

14 As to the superiority prong of Rule 23(b)(3), it  
15 requires that the class action be superior to other available  
16 methods of fair and efficient adjudication. As another judge  
17 of this court has explained, that requirement is satisfied  
18 where "the potential class members are both significant in  
19 numbers and geographically dispersed," and "the interest of the  
20 class as a whole in litigating the many common questions  
21 substantially outweighs any interest by individual members in  
22 bringing and prosecuting separate actions." I'm citing Cromer  
23 Finance LTD v. Berger, 205 F.R.D. 113, 122 (S.D.N.Y. 2001). In  
24 this case, as mentioned, there are more than 150,000 class  
25 members. Each member was not injured to a degree that would

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1 provide a sufficient incentive or indeed any meaningful  
2 incentive to institute litigation on his or her own behalf.  
3 Furthermore, certification for settlement purposes will allow  
4 class counsel to handle the administration of the settlement in  
5 a uniform and efficient manner. Accordingly, I find that a  
6 class action is the superior method of resolving these claims.  
7 Therefore, having found all the prerequisites of Rule 23 to be  
8 met, I certify the class for the purposes of settlement

9 Now I must discern whether the settlement is fair,  
10 reasonable and adequate. Briefly I'll comment on procedural  
11 fairness

12 A presumption of fairness arises where a settlement  
13 was reached after arm's length negotiations between parties  
14 represented by competent counsel, citing Wal-Mart stores, Inc.  
15 v. Visa U.S.A., Inc., 396 F.3d 96, at 116 (2d Cir. 2005). Here  
16 settlement discussions, as counsel have represented, were  
17 conducted at arm's length. Both parties are represented by  
18 capable and experienced counsel. Therefore, I find that the  
19 settlement is entitled to the presumption of adequacy and  
20 procedural fairness.

21 Turning to the more important question of substantive  
22 fairness. That inquiry is guided by the factors set forth by  
23 the Second Circuit in the case of City of Detroit v. Grinnell  
24 Corp., 495 F.2d 448 at 463 (2d Cir. 1974). In assessing these  
25 factors, I am mindful that, as the Second Circuit put the

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1 point, "The evaluation of a proposed settlement requires an  
2 amalgam of delicate balancing, gross approximations and rough  
3 justice." That's at page 468.

4 The first factor involves the complexity, expense, and  
5 likely duration of the litigation. This factor requires me to  
6 way the benefits of a potential settlement against the time and  
7 expense of continued litigation.

8 Plaintiffs' counsel have represented, without  
9 refutation, that this case resolves novel legal questions under  
10 TILA. It potentially could have led to moderately complex and  
11 costly litigation. At a minimum, there assuredly would have  
12 been motions practice, and there might or might not have been  
13 some degree of factual work to test the legal -- the factual  
14 accuracy of the claim of deficient disclosures. Had the case  
15 not been resolved on the motions, we would then have had the  
16 ardors of trial preparation, posttrial motions and appeals.  
17 All of this would have consumed further resources and  
18 potentially depleted the possibility of a recovery for  
19 plaintiffs particularly insofar as lawyers would have had to be  
20 paid. This factor weighs in favor of approval, although the  
21 Court, of course, recognizes that the costs foregone in a TILA  
22 cases which is more likely than some class actions to be  
23 resolved on the face of the disclosure and by measuring it  
24 against the statutory requirements are not as costly as some  
25 other types of class action litigation such as securities class

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1 actions.

2                 The second factor involves the reaction of the class  
3 to the settlement. This is, according to one of my  
4 colleagues, "perhaps the most significant factor." Citing  
5 Maley v. Del Global Techs. Corp., 186 F.Supp. 2d 358 at 362  
6 (S.D.N.Y. 2002). In this case the claims administrator mailed  
7 the settlement notice to the 159,836 class members with known  
8 addresses. Significantly, as of May 21 of this year actually,  
9 no class members had objected. Only 39 members, or about  
10 0.2 percent, opted out. Today nobody came to object to the  
11 settlement. This reaction is highly favorable. It weighs  
12 strongly in favor of approval

13                 The next factor, the third one, looks to whether the  
14 parties have conducted sufficient discovery to understand their  
15 claims and intelligently negotiated settlement terms. In this  
16 case formal discovery had not yet begun. However, there had  
17 been some limited informal discovery and the nature of the  
18 claims here did not really require sustained discovery in the  
19 forms of depositions or e-mail reviews to really enable the  
20 parties to make sense of the claims here. It's not that type  
21 of case. Therefore, the parties were in a position to  
22 determine the class size, the Talbots's net worth, and other  
23 information relevant to certification and settlement. Again,  
24 extended discovery simply wasn't needed to ascertain liability.  
25 Therefore, although this factor doesn't weigh heavily in favor

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1 of approval it doesn't weigh against it either

2                 The fourth factor involved the risks of establishing  
3 liability and damages. I have to weigh here the risk of  
4 litigation against the certainty of recovery. Plaintiffs have  
5 not identified any special risk of establishing liability,  
6 noting only the broad proposition that litigation is uncertain  
7 and that defendants have denied liability. As to damages,  
8 though, there is at least a risk that a jury could have awarded  
9 plaintiffs close to nothing. It may be difficult, if not  
10 impossible, to prove actual damages. And there might be some  
11 question about the -- whether full statutory damages would have  
12 been awarded. But in any event there would have been a real  
13 possibility of no actual damages being awarded and a  
14 significant offset in the form of legal fees. This uncertainty  
15 weighs in favor of approval

16                 Fifth, I'm am to consider the risk of maintaining the  
17 class action through a trial. For the reasons I've given, this  
18 is an appropriately certified class. I can't say that there is  
19 a substantial risk presented to the class certification or that  
20 would have been presented had the case gone the distance.  
21 However, I must recognize the theoretical risk that the  
22 defendants would have successfully opposed class certification  
23 or that some unexpected information would have emerged as the  
24 case moved forward that would call into question either lead  
25 plaintiff's adequacy to represent the class or the suitability

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of class-wide determinations of liability. This factor, to my mind, is not consequential here.

The next factor, the sixth, is whether the defendant has the ability to withstand a greater judgment. Plaintiffs don't identify any reason why Talbots couldn't withstand a greater judgment. I guess one might note that Talbots is a brick-and-mortar retailer. Life is short and uncertain. And these businesses are under some degree of pressure these days. But, Talbots has represented that its net worth exceeds \$100 million. It appears plain to me that it could withstand a greater judgment. However, TILA imposes a \$1 million cap on statutory damages which is really the broader point. Plaintiffs, in other words, could not have recovered dramatically more here. The recovery here is close to 60 percent of the realistic available damages.

Finally, I am to evaluate the reasonableness of the proposed settlement considering the strength of plaintiff's case and the relief offered. The assessment of reasonableness is to take into account the uncertainties of law and fact in the case and the risks and costs inherent with proceeding with such a lawsuit. A risk here was that had the jury found Talbots liable, it might award plaintiffs little in damages. Given that risk, I find that the settlement amount here of \$595,000 is within the scope of reasonableness.

Putting all these factors together, and noting in

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1 particular the absence of any counterindicating factor, I  
2 conclude that the proposed settlement is both procedurally and  
3 substantively fair. Because there are no objections to  
4 address, I thereby approve the proposed settlement is fair,  
5 reasonable, and accurate.

6 Next I am going to turn to the question of attorneys'  
7 fees and costs. Plaintiff counsel seeks \$200,000, an amount  
8 agreed to by the parties. This constitutes all-in 25 percent  
9 of Talbots's total payment to plaintiffs and their counsel if  
10 one includes the attorneys' fees. This request is broadly  
11 consistent with norms of class litigation in this circuit.  
12 While being mindful that the number of class cases is  
13 substantial and cases come in all sorts of shapes and sizes,  
14 but 25 percent by its nature is within the bounds of normal  
15 within the circuit. Significantly, it is important to me and  
16 impressive that attorneys' fees were negotiated here and will  
17 not come from the class payment. That to my mind affords some  
18 degree of procedural regularity because it suggests that  
19 defendants' agreement or nonobjection to this figure was not  
20 coerced. Defendants could have left attorneys' fees to the  
21 Court, which could have decided -- settled on a fee amount  
22 higher or lower. Because the settlement by all accounts was  
23 arrived at in the can before attorneys' fees were opened up,  
24 defense -- the defense did not run a risk of scuttling a  
25 settlement that it was satisfied with by not acceding to

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1 plaintiff's fee demand. So from a procedural point of view  
2 that is significant to me in thinking about the reasonableness  
3 of the fee award here.

4 Courts in this circuit, in addition to inquiring into  
5 the percentage of the recovery, also utilize the so-called  
6 lodestar method as a crosscheck for the reasonableness of fee  
7 awards. Here, plaintiffs' counsel represents that their  
8 request of \$200,000 in fees is approximately 3.2 times their  
9 lodestar, lodestar here referring to fees times hours.  
10 3.2 percent is a multiplier that is consistent with  
11 multipliers, lodestar multipliers that courts in this  
12 jurisdiction have commonly approved. Indeed, for better or  
13 worse courts in this district have often approved lodestar  
14 multipliers between three and five. The multiplier in this  
15 case is, therefore, within a commonly approved range.

16 That said, I'm now going to address the six factors  
17 set forth in Goldberger v. Integrated Resources, Inc., 209 F.3d  
18 43 at 47 (2d Cir. 2000) in determining the reasonableness of  
19 the fee award.

20 The first Goldberger factor is the time and labor  
21 expended by counsel in achieving this settlement. Class  
22 counsel spent approximately 117.8 hours on this case, of which  
23 counsel has estimated about 60 hours preceded settlement  
24 discussions and approximately 60 hours came after those  
25 discussions began. That amount of time is not exceedingly

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impressive on its own terms. It might raise some questions about whether or not a \$200,000 fee award was merited. Doing the math, this will translate into an hourly rate of close to \$1,700 an hour for plaintiffs' counsel. However, plaintiffs' counsel brought certain factors to my attention to me today that mitigate this concern. One is that after 150,000 checks for \$3.73 are sent out, Mr. Bromberg explains he can expect to be besieged by phonecalls from class members trying to make sense of this check and their legal rights and obligations. Given that, the 117 hours likely substantially understates the amount of time in point of fact that plaintiffs' counsel will need to spend on this overall case. That in turn, in some sense, reduces the lodestar potentially materially.

Second, from my colloquy with Mr. Bromberg, it became clear that this case can be seen in a broader perspective. Mr. Bromberg and Mr. Schnall are in the practice of doing consumer rights litigations. Some of those cases bear fruit. Some of them do not. It is appropriate, given the public service that is inherent in such litigation, to take into account the swings and misses as well as the base hits here. And, therefore, if one extrapolates the prism and broadens it to include lawsuits brought that did not bear fruit, the hourly rate that is imputed in the successful cases in some sense overstates the real hourly rate here. Putting all of that together, I regard the time and labor extended by counsel here

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1 as a factor that to some degree favors the settlement here.

2           The second factor involves the magnitude and  
3 complexity of the litigation. The case involves more than 150  
4 class members. It presents at least a novel legal issue under  
5 TILA. There is some degree of magnitude and some degree of  
6 complexity. And I acknowledge that.

7           The third issue is the risk of the litigation. There  
8 is some risk that liability would not have been established.  
9 There is also some risk that a jury would have pooh-poohed the  
10 damages in this case. Those factors are consistent with the  
11 attorneys' fee award here.

12          The fourth factor is the quality of the  
13 representation. Counsel in this case were very capable  
14 advocates. I found the papers submitted to be quality papers  
15 and helpful to me. And I found counsel today to be responsive  
16 and direct and helpful. In addition, no class members have  
17 objected to the attorneys' fees and that is some degree of  
18 confirmation of the quality of counsel's performance.

19          The next factor is the requested fee in relation to  
20 the settlement. Again, a fee of one quarter of the common fund  
21 is consistent with the norms of class litigation in this  
22 circuit particularly in cases where the overall recovery is at  
23 or less than \$1 million.

24          Finally, I am to consider the public policy  
25 implications of this award. TILA is a remedial statute. It is

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1       designed to protect consumers from unfair lending practices.  
2       Plaintiffs' counsel, therefore, played a role as private  
3       attorneys general. This role plays an important role in the  
4       effective enforcement of these statutes. Based on my colloquy  
5       with Mr. Bromberg today, it appears possible, if not likely,  
6       that this lawsuit and ones like it may stimulate greater  
7       compliance by financial institutions with the particular  
8       dimension of TILA at issue here. Accordingly, it is  
9       appropriate that counsel be adequately compensated for their  
10      constructive efforts.

11           On balance, these factors suggest that class counsel  
12      are deserving of a reasonable fee award for their initiative in  
13      bringing this case and for efficiently obtaining a recovery for  
14      the claims. I find that the agreed-upon award of \$200,000 is  
15      fair and reasonable. And I would note that I arrived at this  
16      judgment after having put Mr. Bromberg on the firing line for a  
17      number of minutes posing questions about the reasonableness of  
18      the fee. I came to the hearing today with an open mind as to  
19      whether to approve the fee and I found that the answers I got  
20      from Mr. Bromberg were in the main supportive of such a fee.

21           Finally, I will address class counsel's request, which  
22      defense has agreed to, for a \$5,000 service award for the lead  
23      plaintiff, Ms. Strubel. This award too was negotiated after  
24      and will not come from the settlement fund. In determining the  
25      reasonableness of the award, I've considered a number of

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1 factors, including the time and effort expended by Ms. Strubel,  
2 the ultimate recovery and any burden sustained by Ms. Strubel.  
3 Counsel have represented that Ms. Strubel brought the  
4 disclosure to them. That's important. She took some  
5 initiative here. It's also been represented to me that she met  
6 with class counsel, assisted with the case, heard from class  
7 counsel about developments in the case. She also took the  
8 risk, for what it's worth, that had formal discovery been  
9 commenced she might have been deposed and inconvenienced. In  
10 light of these burdens, in light of the fact that the award to  
11 the lead plaintiff will not deplete the settlement fund, in  
12 light of the need to incent people to serve as lead plaintiff  
13 and in light of fact that \$5,000 is simply not that much money  
14 I find that the request for \$5,000 for the lead plaintiff is  
15 fair and reasonable. So I approve that too

16 Before we adjourn, counsel, beginning with the  
17 plaintiffs, is there anything else the parties would like me to  
18 address?

19 MR. BROMBERG: No, your Honor.

20 THE COURT: Anything?

21 MR. MILLER: No, your Honor.

22 THE COURT: Again, I thank counsel for their able  
23 advocacy and for, Mr. Bromberg in particular, your helpful  
24 answers to me today as well as you, Mr. Miller. The colloquy  
25 today gave me more comfort in approving the dimensions of the

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1 settlement here. I will issue an order shortly that embodies  
2 the rulings that I have made and incorporates by reference my  
3 analysis today from the bench.

4 We stand adjourned. I wish you well.

5 (Adjourned)

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